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ROBERT D. SCARBOROUGH, JR. et al., Order Denying Defendants' Motion to Compel

Elizabeth E. Long

Fulton County Superior Court Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

**ROBERT D. SCARBOROUGH, JR. and
JOHN R. HAMPARIAN,**

Plaintiffs,

v.

**ANTHONY LAIR; AARON INGRAM;
BAKER, DONELSON, BEARMAN,
CALDWELL, & BERKOWITZ, P.C.; and
JOSEPH DELGADO,**

Defendants.

**CIVIL ACTION NO.
2017CV290622**

Business Case Div. 2

ORDER ON DEFENDANTS' MOTION TO COMPEL

The above styled action is before this Court on Defendants Anthony Lair and Aaron Ingram's Motion to Compel. Having considered the entire record and the motion, the Court finds as follows:

SUMMARY OF PLEADINGS

Plaintiffs Robert D. Scarborough, Jr. and John R. Hamparian are minority shareholders in NeoMed, Inc. ("NeoMed"), a company that provides neonatal focused devices. Defendant Anthony Lair is a director, majority shareholder, and the Chief Executive Officer of NeoMed and Defendant Aaron Ingram is its President. Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker Donelson") has served as NeoMed's legal counsel since the company's formation in 2007 and Joseph Delgado, an attorney at Baker Donelson, in his capacity as counsel was involved in the transaction central to this litigation.

Specifically, Plaintiffs assert claims of fraud/misrepresentation for Defendants' alleged actions and omissions with respect to NeoMed's acquisition of NM Fulfillment, a company co-owned by Defendant Lair ("NM Fulfillment Acquisition"). Plaintiffs assert Defendants misrepresented, omitted, and suppressed materials facts regarding the NM Fulfillment Acquisition, including NM Fulfillment's valuation, the dilutive effect of the proposed acquisition on Plaintiffs' shares, and the nature of the association of NM Fulfillment with Defendant Lair's company, Specialty Medical Products. Additionally, Plaintiffs allege Defendants Lair and Ingram have breached fiduciary duties owed to Plaintiffs by engaging in self-dealing and corporate waste, co-mingling NeoMed's funds, and refusing to provide Plaintiffs with NeoMed's financial information.

ANALYSIS

With respect to the general scope of discovery, O.C.G.A. §9-11-26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence...

The powers of the trial court to control the time, place, scope and financing of discovery are construed broadly for the protection of the parties and others from whom discovery is sought. *See Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 589, 452 S.E.2d 159, 162 (1994), *disapproved of on other grounds by Chrysler Grp., LLC v. Walden*, 303 Ga. 358, 364, 812 S.E.2d 244, 250 (2018); *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 899, 321 S.E.2d 383, 385 (1984).

Here, in their Motion to Compel, Defendants Lair and Ingram assert Plaintiffs have failed to provide full and complete responses to their respective Requests for Production of Documents (“RPDs”) and Interrogatories. The Court addresses each disputed discovery request in turn below.

A. Defendant Lair’s Discovery Requests

a. RPD No. 1: NeoMed’s Formation and Organization

RPD No. 1 seeks “all documents regarding the organization and formation of NeoMed.” Insofar as in their response to the Motion to Compel Plaintiffs affirmatively assert they have produced all documents in their possession responsive to this request, there is nothing further for the Court to compel. The Motion to Compel is DENIED as to this request.

b. RPD No. 2: Plaintiffs’ Companies’ Formation and Organization

RPD No. 2 seeks “all documents regarding the organization and formation of [each Plaintiff’s] distribution company.” Plaintiffs object to this request on the grounds it is “not calculated to lead to the discovery of admissible evidence and asks for information about a non-party entity.” The Court agrees. Plaintiffs’ distribution companies are not parties to this action. Although the pleadings reference Plaintiffs’ distribution companies, Defendants fail to articulate how documents regarding the organization and formation of those separate companies have any relevance to the claims asserted in this action. Thus, the Motion to Compel is DENIED as to this request.

c. RPD Nos. 18 and 19: Documents Related to Alleged Damages

RPD No. 18 seeks “all documents which refer or relate to [Plaintiffs’] demand(s) for relief in the Amended Complaint.” RPD No.19 seeks “all raw data and computation sheets upon which the amount of any alleged claim of damages is or may be based; the documents from

which any exhibit purporting to summarize, demonstrate, or otherwise reflect any alleged unlawful act by Defendants was prepared; or documents which support Plaintiffs' damages claims as set forth in document filed and/or served by Plaintiffs in this case." Plaintiffs objected on the basis of attorney client privilege and work product doctrine but assert they will ultimately supplement their response with non-privileged, responsive documents in the future.

The Court finds RPD No. 18 is impossibly vague and broad insofar as it seeks "all documents" related to Plaintiffs' demands for relief. With respect to RPD No. 19, the Court agrees this request implicates the attorney client privilege and work product doctrine and further finds the request is premature insofar as discovery is ongoing. As discovery progresses and upon calculating their damages sought, Plaintiffs are directed to promptly supplement their responses with any non-privileged responsive documents.

d. RPD Nos. 22-24: Expert and Fact Witness Documents and Communications

RPD No. 22 seeks "any and all statements, affidavits or declarations obtained by [Plaintiffs] or [Plaintiffs'] counsel or agent, as well as any drafts of same, from any witness or prospective witness in this case." RPD No. 23 seeks "all documents provided to any expert witness and/or any expert or consultant with whom [Plaintiffs] and/or [Plaintiffs'] attorney(s) have consulted in connection with any matter relating to this action." RPD No. 24 seeks "all documents referring, relating or containing any report, summary, draft, or other communication prepared by any expert or consultant with whom [Plaintiffs] and/or [Plaintiffs'] attorney(s) conferred in connection with any matter at issue in this action." Plaintiffs objected on the grounds of attorney client privilege and work product doctrine.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389(II), 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The privilege has long been recognized in Georgia, see Fire Ass'n

of Philadelphia v. Fleming, 78 Ga. 733(3), 3 S.E. 420 (1887), and is currently codified as follows: “There are certain admissions and communications excluded from evidence on grounds of public policy, including ... [c]ommunications between attorney and client.” O.C.G.A. § 24-5-501(a)(2). The privilege generally attaches when legal advice is sought from an attorney, and operates to protect from compelled disclosure any communications, made in confidence, relating to the matter on which the client seeks advice. Paul S. Milich, *Georgia Rules of Evidence*, § 21:1, at 849 (2012–2013 ed.)...

St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 421–23, 746 S.E.2d 98, 103 (2013) (footnote omitted).

With respect to the work product doctrine,

O.C.G.A. § 9-11-26(b)(3) generally prohibits the compelled disclosure of materials “prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative” unless the party seeking their disclosure shows (1) that it has a “substantial need” for the materials to prepare its case and (2) that it is “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Wellstar Health Sys. v. Jordan, 293 Ga. 12, 17, 743 S.E.2d 375, 379 (2013). Even if the requisite showing is made to compel disclosure under this standard, absolute protection is still afforded to “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” OCGA § 9-11-26(b)(3). See McKinnon v. Smock, 264 Ga. 375(2), 445 S.E.2d 526 (1994).

St. Simons Waterfront, LLC, 293 Ga. at 429.

Applying the standards summarized above to the case at bar, the Court generally agrees RPD Nos. 22-24 seek documents protected under the attorney client privilege and work product doctrine as the requests seek documents prepared by or in consultation with counsel in anticipation of litigation or for trial. As to RPD No. 22, Plaintiffs are directed to provide their list of anticipated or prospective witnesses and to supplement that information as necessary during the course of this litigation. *See* Part A(j), *infra*. However, the Motion to Compel is otherwise DENIED as to RPD No. 22.

With respect to RPD Nos. 23-24, regarding discovery sought concerning Plaintiffs' expert witnesses, Plaintiffs assert they have not yet retained experts. Upon retaining their experts, Plaintiffs should supplement their discovery response with the information and the expert disclosures contemplated under O.C.G.A. §9-11-26(b)(4), including "the subject matter on which the expert is expected to testify" and "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." However, the Motion to Compel is otherwise DENIED as to RPD Nos. 23 and 24.

e. RPD Nos. 25-26: Impeachment and Reliance

RPD No. 25 seeks "all documents which [Plaintiffs] intend to use to impeach any witness, or which [Plaintiffs] can reasonably foresee using in that manner." RPD No. 26 seeks "all documents not otherwise requested herein on which Plaintiffs intend to rely in establishing the truth of any claim, allegation or fact set forth in the Amended Complaint, [Plaintiffs'] responses to Defendants' First Interrogatories and Defendants' First Requests for Admission, or any other document filed with the Court and/or served by Plaintiffs in this case." Plaintiffs assert these requests are premature insofar as discovery is ongoing and improperly seeks information subject to the work product doctrine. Additionally, Plaintiffs assert they have produced all documents responsive to this request.

With respect to RPD No. 25, to the extent this request is directed at obtaining evidence regarding character and evidence of the conviction of a crime for permissible impeachment purposes, *e.g.*, O.C.G.A. §§ 24-6-608 and 24-6-609, and to the extent they have not already done so, Plaintiffs are directed to produce responsive documents. As to other grounds for impeachment under Georgia's Evidence Code, the Court agrees the request is premature given that discovery is ongoing.

Regarding RPD No. 26, the Court finds this request is overly broad and vague. The Motion to Compel is DENIED as to this request.

f. Interrogatory No. 1: Plaintiffs' Identifying Information

Interrogatory No. 1 seeks Plaintiffs' "full name, date of birth, last four digits of [Plaintiffs'] social security number, home address, driver's license number, each and every other name by which [Plaintiffs] have been known in [their] lifetime, and all addresses where [Plaintiffs] have resided during the past ten years." Plaintiffs responded to the interrogatory but did not provide the last four digits of their Social Security number, their driver's license number, or other names by which each Plaintiff has been known previously, and Plaintiff Hamparian did not provide information regarding his address for the last ten years.

Defendants have failed to articulate and the Court cannot discern the relevance of or need for the last four digits of Plaintiffs' Social Security numbers. The Motion to Compel is DENIED as to that request. However, Plaintiffs are directed to provide their driver's license numbers, any aliases by which they have been known previously, and their address(es) for the last ten years, to the extent they have not done so already.

g. Interrogatory No. 2: Telephone Information

Interrogatory No. 2 seeks "any and all phone numbers and the corresponding provider for each number for any phones (both cell phones and land lines) used by [Plaintiffs] during the 2016 and 2017 calendar years." Plaintiffs responded to this request but did not give their provider information. Defendants have not articulated and the Court cannot discern the relevance or need for Plaintiffs' telephone provider information. The Motion to Compel any further production is DENIED.

h. Interrogatory No. 3: Email Information

Interrogatory No. 3 seeks "any and all email addresses from which [Plaintiffs] have sent email or to which [Plaintiffs] have received email during the 2016 and 2017 calendar years, as well as the corresponding provider (e.g., Gmail, Hotmail, etc.)." Plaintiff Hamparian provided two email addresses but Defendants complain he did not provide the corresponding provider information. Again, Defendants have not articulated and the Court cannot determine from this record and the pending claims the relevance or need for Plaintiffs' email provider information. The Motion to Compel any further production is DENIED.

i. Interrogatory No. 5: Employment Information

Interrogatory No. 5 seeks "the name and address of each employer for which [Plaintiffs] worked, setting forth the inclusive date(s) of each such employment, job titles, and the reason(s) [Plaintiff] left each employer" and "[i]f [Plaintiff] worked for any entity as an independent contractor or in a self-employed capacity" the interrogatory asks Plaintiffs to "state and provide the information requested above" from 2015 through trial.

Plaintiffs responded to this interrogatory, however, Defendants assert Plaintiffs did not provide the address for each employer, the dates of employment, job titles, and the reason(s) Plaintiffs left each employer. Defendants' motion is GRANTED IN PART. To the extent they have not done so already, Plaintiffs are directed to supplement their responses with the names and addresses of all of their former employers from 2015 through trial and their corresponding dates of employment. The motion is otherwise DENIED.

j. Interrogatory No. 6: Individuals with Knowledge of Facts and Allegations

Interrogatory No. 6 seeks "each person known or believed by Plaintiff to have knowledge of any of the facts or allegations in the pleadings filed in this case, including contact information

for each such individual." Plaintiffs both objected on the ground they could not be expected to identify every individual who may have knowledge of any of the facts or allegations in the pleadings. Nevertheless, Plaintiffs responded with the names of individuals known to them to have knowledge of the relevant events. Additionally, Plaintiff Scarborough indicated that his attorney had requested depositions of individuals affiliated with NeoMed that have knowledge of the allegations in the pleadings and stated there are also "several former NeoMed employees whose names and addresses [Plaintiff] will provide when [he] supplement[s] this response."

To the extent Plaintiffs are aware or become aware of any other individuals with knowledge of the events giving rise to this action, Plaintiffs are required to supplement their responses accordingly with those names and contact information, if available. *See* O.C.G.A. § 9-11-26(e)(1)(A) ("A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:...The identity and location of persons having knowledge of discoverable matters").

k. Interrogatory No. 7: Witness Interviews

Interrogatory No. 7 states: "Please identify each person whom you, your attorney(s), or anyone acting on your behalf, have contacted or attempted to contact concerning any allegations contained in the Amended Complaint. In doing so, please identify the subject matter, nature (i.e., oral, written, electronic, etc.), and date of the communication or attempted communication; all witnesses to the communication or attempted communication. Identify any written (drafts or final) statements provided to and/or from such persons, as well as any notes, audio and/or visual recordings, or other documents summarizing or memorializing such statements, interviews and/or discussions."

The Court finds the information requested in Interrogatory No. 7 is protected under the attorney client privilege and work product doctrine insofar as it encompasses Plaintiffs' communications with their counsel as well as documents, statements and notes prepared by Plaintiffs and their agents in anticipation of litigation or for trial. *See St. Simons Waterfront, LLC*, 293 Ga. at 429; *Wellstar Health Sys.*, 293 Ga. at 17. Further, Defendants have failed to show that they have a "substantial need" for this information or that disclosure of such information is warranted. *See* O.C.G.A. §9-11-26(b)(3) ("Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). The Motion to Compel is DENIED as to this request.

I. Interrogatory No. 14: Contention Interrogatory

Interrogatory 14 to Plaintiff Scarborough seeks a description of how each Defendant "could have, and should have, caused these contracts to be entered into on behalf of NeoMed, not NM Fulfillment/Specialty,' as alleged in Paragraph 28 of the Amended Complaint." Plaintiff Scarborough objected to the request as calling for "legal conclusions and opinions" but nevertheless responded: "[T]he contracts should have been between NeoMed and the GPOs. Tony Lair and Marc Waldman stated in emails that NeoMed has the contracts. We also have signed contract [sic] from Hillary Sherman that was signed on part of [sic] NeoMed and not NMF/ Specialty."

Interrogatory No. 14 is a contention interrogatory. “[C]ontention interrogatories are broadly defined as questions that ask an opposing party to state the facts, evidence, or legal theories upon which it bases its specified contention(s) or that asks [sic] an opponent to explain his or her contention(s).” In re Domestic Air Transp. Antitrust Litig., No. 1:90-CV-2485-MHS, 1992 WL 120351, at *1 (N.D. Ga. Apr. 8, 1992) (citing McCaugherty v. Siffermann, 132 F.R.D. 234, 249 (N.D.Cal.1990)). Although more often used in federal civil practice pursuant to Fed. R. Civ. P. 33(a)(2), contention interrogatories are authorized under our state analogue to Rule 33 under Georgia’s Civil Practice Act, O.C.G.A. §9-11-33(b)(2).

Here, Plaintiffs have supplied a response which stands as their contention as to how Defendants (who notably are the CEO and President of NeoMed, the senior officers leading NeoMed) “could have, and should have, caused [certain] contracts to be entered into on behalf of NeoMed, not NM Fulfillment/Specialty.” To the extent Defendants seek clarification or additional information regarding this allegation, the Court finds such would be addressed at Plaintiffs’ depositions.

m. Interrogatory No. 16: Contention Interrogatory

Interrogatory No. 16 to Plaintiff Scarborough, another contention interrogatory, seeks a description of “the documents [Scarborough] requested from each Defendant in preparation for the Fall 2016 shareholder meeting.” Plaintiff Scarborough responded: “I requested pertinent documents/financial statements that would provide a clear picture as to how the purchase was going to happen and how it would affect my shares.”

Interrogatory No. 16 to Plaintiff Hamparian, another contention interrogatory, seeks a detailed description of “how each Defendant ‘caused Specialty and/or NM Fulfillment to receive benefits from NeoMed in the rform [sic] of better pricing, terms, shipping costs, etc., and did not

provide those same benefits to the distributorships of [Plaintiffs],’ as alleged in Paragraph 63 of the Amended Complaint.” Plaintiff Hamparian responded: “It is clear from the financials of NeoMed that it treated Specialty different from other distributors by, for example, allowing Specialty to carry a multi-million dollar debt to NeoMed for product. This benefits Specialty to the detriment of NeoMed.”

Again, insofar as Plaintiffs Scarborough and Hamparian have set forth their contentions in response to these interrogatories and to the extent Defendants seeks further clarification or additional information regarding these allegations, such is better addressed through appropriate questioning at Plaintiffs’ depositions.

n. Lair’s Second Requests for Production

In his Second Requests for Production of Documents, Defendant Lair seeks “all documents reflecting any communication Plaintiffs had with Joe Delgado relating to NeoMed or NM Fulfillment” to the extent not already produced. Given the claims asserted by Plaintiffs against Defendants arising from alleged communications with Defendant Delgado, the Court finds this request is reasonably calculated to lead to the discovery of admissible evidence. The Motion to Compel is GRANTED with respect to this request.

B. Defendant Ingram’s Discovery Requests

a. RPD Nos. 1-5: Attorney Client Documents as between Plaintiffs and Baker Donelson

Ingram’s RPD No. 1 seeks “any documents regarding, supporting, or undermining the allegation that an attorney-client relationship exists between Plaintiff and Baker Donelson.” RPD No. 2 seeks “any engagement letter(s) between Plaintiff and Baker Donelson.” RPD No. 3 seeks “all documents related to any and all legal fees that Plaintiff has paid to Baker Donelson.” RPD

No. 4 seeks "all documents related to or evidencing any legal services provided to Plaintiff by Baker Donelson." Finally, RPD No. 5 seeks "all communications between August 2016 and the date of the commencement of this action with [Plaintiffs'] attorney(s) regarding NeoMed interactions. With the exception of the date and the names of those party to the communications, these communications may be redacted."

RPD Nos. 1-5 appear to all be directed at obtaining documents and information relevant to Plaintiffs' Motion to Disqualify and Second Motion to Disqualify through which Plaintiffs sought to disqualify Baker Donelson from representing Defendants in this action. However, insofar as these requests have been mooted by the Court's previous rulings denying Plaintiffs' motions and whereas Defendants have not articulated and the Court cannot discern any other relevance of these requests to the pending claims in this action, the Motion to Compel is DENIED as to RPD Nos. 1-5.

b. *Interrogatory No. 3: Consultations with Attorneys*

Interrogatory No. 3 seeks identification of "each and every attorney with whom [Plaintiffs] consulted regarding the NM Fulfillment Acquisition" and a description of "the purpose of those communications." Plaintiffs objected on the grounds of attorney client privilege. Plaintiff Scarborough, nevertheless, provided a response listing attorneys with whom he consulted but Defendants complain that response was deficient because Scarborough did not describe the purpose of those communications. The Court agrees that Interrogatory No. 3 plainly seeks information protected under the attorney client privilege and as such the Motion to Compel is DENIED as to this discovery request.

C. Requests for Attorneys' Fees Under O.C.G.A. §9-11-37

Defendants seek their attorneys' fees incurred in preparing the instant Motion to Compel and Plaintiffs, in turn, request an award of their attorneys' fees incurred in having to respond to the motion. Having considered the record and insofar as the Court herein has granted in part and denied in part the relief requested in the Motion to Compel, the Court declines to award any attorneys' fees.

SO ORDERED this 24 day of July, 2018.



ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court—Atlanta Judicial Circuit

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